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No. 524

IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

CARTER MOUNTAIN TRANSMISSION CORPORATION,
Petitioner

v.

FEDERAL COMMUNICATIONS COMMISSION

and

JOSEPH P. ERNST and MILDRED V. ERNST,
d/b as CHIEF WASHAKIE TV, *Respondents*

On petition for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF FOR CHIEF WASHAKIE TV IN OPPOSITION

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Opinions Below

The opinion of the court below (Pet. App. 1-12) is reported at 321 F. 2d 359. The decision of the Federal Communications Commission there affirmed is reported at 32 FCC 459 (1962).

Jurisdiction

The judgment of the Circuit Court of Appeals was entered on May 23, 1963 (Pet. App. 12). A petition for

rehearing en banc was denied by the nine judges of the court below in a unanimous order entered July 9, 1963. The petition for a writ of certiorari was filed October 7, 1963. The jurisdiction of this Court rests on 28 U.S.C. Sec. 1254(1).

Question Presented

Whether the Federal Communications Commission, in acting on an application by a common carrier for radio microwave frequencies by which to pick up and transmit the signals of out-of-state television broadcast stations to the common carrier's sole proposed customer, an associated company operating CATV systems in the only six towns in northwestern Wyoming which have a population in excess of 1,000 persons, may consider the adverse impact which the additional and improved signals thus supplied CATV subscribers in three of those six towns (Riverton, Lander and Thermopolis, Wyo.) would have on the ability of northwestern Wyoming's only television broadcast station (KWRB-TV) to continue to provide some 22,500 persons in that area with an only television service and some 45,000 persons with a program service tailored to their particular needs.

Statutes and Rules Involved

Section 307(a) of the Communications Act of 1934, as amended, (47 U.S.C. Sec. 307(a)), provides:

> The Commission, if public convenience, interest, or necessity will be served thereby, subject to the limitations of this Act, shall grant to any applicant therefor a station license provided for by this Act.

FCC Rule 21.700 (1 Pike & Fischer, *Radio Regulation*, 71:700), governing the issuance of point-to-point radio microwave frequencies for common carrier use reads as follows:

§ 21.700. *Eligibility.*—Authorizations for stations in this service will be issued to existing and proposed communication common carriers. Applications will be granted only in cases where it is shown that (a) the applicant is legally, financially, technically and otherwise qualified to render the proposed service, (b) there are frequencies available to enable the applicant to render a satisfactory service, and (c) the public interest, convenience or necessity would be served by a grant thereof.

Statement

In order that the questions posed by the petitioner (Pet. 2-3) may be considered in a factual setting and not in the abstract, the following background facts are deemed pertinent to the instant petition to review the judgment of the court below, affirming the Commission's refusal, unless certain conditions were first met, to grant petitioner's application for radio microwave frequencies by which to serve an associated company operating CATV systems in Riverton, Lander, and Thermopolis, Wyoming:[1]

Pursuant to Congressional mandates requiring the Commission "to make available, so far as possible, to *all* the people of the United States a rapid, efficient, Nation-wide, and world-wide wire and radio communications service" (47 U.S.C. Sec. 151),[2] equitably apportioned "among the several States and communities" (47 U.S.C. Sec. 307(b)), the Commission in 1952, after voluminous rule-making proceedings extending over a four-year period, promul-

[1] The instant record shows that Bliss and Mitchell, who are the principal officers and stockholders (96.7%) of the company (Western Television Corporation) which operates CATV systems in the only six towns in northwestern Wyoming with a population in excess of 1,000 persons, are also president and vice president, and own 50% of the stock of Carter Mountain Transmission Corporation (32 FCC 472, Fdgs. 6 and 7).

[2] Emphasis supplied throughout this brief.

gated a nation-wide television allocation table (Rule 3.606; 1 Pike & Fischer, *Radio Regulation* 53: 606). *Logansport Broadcasting Corp.* v. *United States*, 93 U.S. App. D.C. 342, 210 F. 2d 24 (1954). In there allocating given channels to specific states and communities for off-the-air television broadcast use, two priorities were uppermost in the Commission's deliberations: First, of providing to the extent possible at least one off-the-air television signal (coverage facilities) to all the people of the United States, rural as well as urban, and secondly, of providing at least one local outlet (origination facilities) to as many communities as possible (see 1 Pike & Fischer, *Radio Regulation* (Pt. III), p. 91:620, para. 63).

Using those criteria the Commission in 1952 assigned ten VHF channels to seven different towns (since increased to eight) in the state of Wyoming—including Channel 10 to Riverton, Wyoming (Rule 3.606). Because of that state's sparse and scattered population,[1] only three of the ten VHF channels thus allocated to Wyoming have been activated to date (32 FCC 466, 472): Station KFBC-TV on Channel 5 in the southeastern corner of the state (Cheyenne); Station KTWO-TV on Channel 2 in east Central Wyoming (Casper); and Station KWRB-TV on Channel 10 in northwestern Wyoming (Riverton). The last-mentioned station, licensed to respondent Joseph P. Ernst and Mildred N. Ernst d b as Chief Washakie TV, with its main studio in Thermopolis, identifies itself on the air, pursuant to prior Commission consent, as a Riverton-Lander-Thermopolis-Worland station (Tr. 134, J.A. 11).

In April 1958, approximately four months after Station KWRB-TV went on the air, apparently of the view that the local television station would slow down the expansion of their CATV operations in northwestern Wyoming unless the quality of the pictures provided on the cable was

[1] Although Wyoming has an area twelve times that of Massachusetts, its entire population in 1960 (330,066 persons) was less than that of the city of Portland, Oregon.

improved (cf. 32 FCC 475; Fdg. 16), the cable operators assisted in the organization of Carter Mountain Transmission Corporation, which applied for microwave radio frequencies by which to pick up television signals atop Copper Mountain and to deliver such signals to CATV systems in three of the four towns with which KWRB-TV is identified (Riverton, Lander, and Thermopolis) (R. 1-23).

At or about the time that petitioner filed the aforementioned microwave application, the attention of Congress and the Commission was being forcefully directed to developments which indicated that the "piping in" (with and without microwave facilities) of television signals from distant metropolitan markets for use by CATV systems was in some instances precluding the establishment of a live television service in small communities which would otherwise support stations of their own, and was in other instances jeopardizing the continuation of existing stations in a number of small markets,—meaning that such communities were not being provided a local outlet of their own and that persons *in rural areas not accessible to a CATV system* were being deprived of a television service of any kind, thus thwarting the 1952 TV allocation table and the basic priorities there enunciated (cf. *CATV and TV Repeater Services*, 26 FCC 403).

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[1] All "R.—" references in this brief are to the record as certified by the Commission to the court below.

[2] The Commission was quite aware that television homes on cable systems which (like those in Riverton, Lander, and Thermopolis) do not carry the local station are to all intents and purposes lost to that station: First, because cable subscribers rarely purchase "rabbit ears" and almost never incur the expense of installing a rooftop antenna; second, because built-in antennas are frequently disconnected when a television set is attached to a cable system; and third, because most sets connected to a cable system are not equipped for a switchover to a live pick-up, except by going to the trouble of disconnecting the set from the cable for a particular program.

Action on petitioner's application was accordingly held in abeyance while the Commission conducted an overall inquiry into the impact of CATV systems, translators, satellites and repeaters on the orderly development of television broadcasting (FCC Docket No. 12443). As a result of that proceeding, in a Report and Order adopted April 13, 1959 (*CATV and TV Repeater Services*, 26 FCC 403), though recognizing the likelihood or possibility of adverse impact of CATV operations on regular television stations, the Commission was unable to conclude from the data *there adduced* "at what point, in terms of size of the market or auxiliary, the number of signals brought in, etc., this impact becomes serious enough to threaten the station's continued existence or serious degradation of the extent and quality of its service" (*CATV and TV Repeater Services*, 26 FCC 403, 421-422, para. 45; cf. paras. 5, 26, 51, 54, 70, 82, 85).[1]

Although concluding in general that it lacked jurisdiction, in the absence of additional legislation, to regulate CATV systems in those instances where radio frequencies were *not* being utilized in connection with such operations, it elsewhere recognized in its Report and Order, both under its own decisions and those of the courts, that "economic injury, amounting to public detriment", must be considered, particularly in "307(b) situations" (*CATV and TV Repeater Services*, 26 FCC 403, 435, para. 82); that "clearly, in the present series of situations [where CATV and other auxiliary services are seeking radio frequencies in areas served by regular TV stations] there are '307(b)' considerations involved" (*CATV and TV Repeater Services*, 26 FCC 403, 435, para. 83); and

[1] The herein referenced paragraphs from the Commission's Report and Order in FCC Docket 12443, (*CATV and TV Repeater Services*, 26 FCC 403) should be considered by the Court in connection with the particular paragraphs which petitioner has excerpted therefrom (Pet. App. 21-24), and as qualifying the broad interpretation which the petitioner places on that Report (Pet. 18-19).

that in those situations where the number of persons "losing their only service is considerably greater than the number who would receive the multiple service", the public interest would be affected and findings thereon would be required (*CATV and TV Repeater Services*, 26 FCC 403, 438, para. 90, cf. para. 82).

In a timely filed pleading objecting to a grant of petitioner's microwave application, KWRB-TV requested an opportunity by an evidentiary hearing to show, in line with the Report and Order in FCC Docket No. 12443, (1) that sparsely populated northwestern Wyoming which KWRB-TV serves is an area where the impact of improved CATV operations (via additional microwave facilities) would destroy, jeopardize, or diminish the service of a live television broadcast station, and (2) that the number of persons in northwestern Wyoming who would thus lose their sole television service was considerably greater than the number who would thereby gain a multiple service via the microwave equipped CATV systems (R. 38-61).

In a subsequently ordered hearing, the following facts were established by evidence which for the most part was wholly uncontradicted (R. 405-433; 32 FCC 468-482; Fdgs. 1-34):

> That the U.S. Census lists only 15 "towns" or other "incorporated places" (with a combined 1960 population of 27,323 persons) in those portions of the seven counties in northwestern Wyoming embraced within KWRB-TV's Grade B contour (Fdg. 14); that the entire area (13,845 square miles) lying within such contour had a 1950 population of only 36,918 persons and a 1960 population of approximately 45,000 persons—representing an average population density of less than one family per square mile (Fdgs. 10-12); and that there are only four towns in

[1] At the time the parties exchanged their exhibits in the instant hearing (November, 1960), minor civil division 1960 census population figures for Wyoming had not yet been released by the Census Bureau. The 45,000 approximation figure for 1960 was

KWRB-TV's Grade A contour (Lander, Thermopolis, Riverton and Worland) and only two towns between KWRB-TV's Grade A and B contours (Basin and Greybull) which have populations in excess of 1,000 persons (Fdg. 15);

That Western Television Corporation operates a CATV system in each of the aforesaid six towns but not in the nine smaller towns and incorporated places within KWRB-TV's service area (Fdg. 16); that some 2535 families (approximately 8870 persons) are presently served by Western's cable systems in those six towns (Fdg. 16); that Western's own estimate of the potential number of subscribers to its cable systems in those six towns is 5635 families (approximately 19,720 persons) (Fdg. 16); that the programs of three stations (KOOK-TV, Billings, Montana; KTWO-TV, Casper, Wyoming, and KID-TV, Idaho Falls, Idaho) are carried on the cable systems in all six towns, with those of a fourth station (KGHL-TV, Billings) also available on the cable in Thermopolis, Worland, Basin and Greybull, whereas KWRB-TV's programs are not carried on the cable systems in any of those towns (Fdg. 17); that because of distant pickup points and line losses (without microwave facilities), the quality of the pictures on the cable systems in Riverton, Lander and Thermopolis is not "good" (Fdg. 19; KWRB-TV Exs. 5, 5A, 6; Tr. 151-158, 248);

That because of the common network affiliation of KID-TV and KOOK-TV and the common source of their non-locally originated programming,[1] with

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arrived at by assuming that KWRB-TV's Grade B contour continued to encompass the same *proportion* of a given county's *population* in 1960 as it did in 1950 (e.g., 43.7% of the *population* of Big Horn County, 92.3% of the *population* of Fremont County, etc.) See Fdgs. 12-13.

[1] KID-TV picks up its programs from ABC and CBS stations in Salt Lake City and KOOK-TV in turn picks up the signal of KID-TV (Tr. 135).

KTWO-TV and KWRB-TV affiliated with all three networks, the same network programs broadcast by KWRB-TV frequently appear simultaneously on as many as three channels on the cable system (Fdgs. 18-19); that national and local spots sandwiched in by KWRB-TV between popular network shows, with KWRB-TV not carried on the cable, are thus not seen by persons viewing those programs on the cable systems (Fdg. 19); that this "splitting" of the audience in KWRB-TV's service area has made it extremely difficult for KWRB-TV to sell national and local "spots" (Tr. 142, 165, 182-184, 232, 235, 243-244, 337; cf. Fdg. 33); that 66.6% of KWRB-TV's revenues are derived from local advertisers, with 57% of its total revenue derived from Riverton, Lander and Thermopolis, the very towns to which the microwave facilities here sought are designed to bring additional and improved signals (Fdg. 33); that the amount of revenue obtained from each of the four principal towns within KWRB-TV's service area is in inverse proportion to the number of subscribers who are on the cable system in each of those towns (Fdgs. 16, 33);[2] that if the local revenues

[2] The striking correlation between revenues and number of CATV subscribers in the four towns having a population in excess of 1,000 persons within KWRB-TV's Grade A contour is apparent from the following chart (see 32 FCC 468, 473-475, 481, Fdgs. 13, 14-16, 33):

Town	1960 Population	1960 Homes	CATV Homes	% of Homes on Cable	(1959) Local Revenue	(1959) Per Capita
Lander	4182	1,195	—	0%	$14,199.31	$3.39
Riverton	6845	1,956	250	12%	17,429.14	2.54
Thermopolis	3955	1,130	500	44%	6,457.20	1.63
Worland	5806	1,659	1225	74%	2,485.45	0.43
Total	20,788	5,940	1975	33%	$48,563.10	$1.95

It will thus be noted that although Lander is appreciably smaller than Worland, the local revenues which KWRB-TV derived from Lander in 1959 were about six times those received from Worland. Similarly, those derived from Thermopolis, a town only 2/3 as large as Worland, were approximately 2½ times greater than those

derived from Lander and Riverton dropped, as a result of additional and improved signals on the cable obtainable via microwave, to the smaller amounts presently received in Thermopolis and Worland where 44% and 74% of the homes are on the cable, the present gap between cash income and outgo could no longer be bridged by the Ernsts' foregoing salaries, nor by income from nor by the sale of their AM properties (cf. Fdgs. 32-33; cf. 32 FCC 485, Concl. 12);

That (because of the high cost of coaxial lines and attendant repeaters) CATV systems are unable to serve persons on the outskirts of the towns in which they operate, not to mention those residing in rural areas (see Fdg. 28); that one-watt VHF boosters are similarly restricted for the most part to persons residing in the towns to which they are licensed (see Fdg. 28; KWRB-TV Ex. 6, Tr. 158, 164, 165); that KWRB-TV is providing a highly commendable program service tailored to the needs of the area it serves (local news, local entertainment features such as local rodeos and state fairs; local educational roundtable discussion, local farm agents, local agricultural reports, local weather reports, local high school and University of Wyoming football games, and local political broadcasts) (Fdgs. 22-28); and

That if KWRB-TV ceased to operate, approximately 50% of the 45,000 persons now served by KWRB-

from Worland. Conversely stated, in Worland, where 74% of the homes (i.e., some 90% of the TV homes) were on the cable, the local revenues were insignificant, because local merchants and other local advertisers in Worland were quite aware in 1959 that their advertising messages, when sandwiched in between popular network shows carried by KWRB-TV, would not be seen by their neighbors who were viewing that same network show on the cable from KID-TV, KOOK-TV, KDHL-TV, or KTWO-TV. On the other hand, in Lander where the cable viewing in 1959 was nil, merchants and other advertisers in that community knew that the popular network shows were being viewed on KWRB-TV and that their local advertising messages thus would receive full exposure.

> TV[1] would be without a television service of any kind, and the entire 45,000 persons within KWRB-TV's service area (except for 187 persons in Natrona County) would be without any local origination facilities and without any programs geared to their local needs (cf. Fdgs. 28-29).

On the basis of the foregoing findings, the Commission (with one member dissenting) concluded that a grant to petitioner of the microwave frequencies here sought would jeopardize KWRB-TV's ability to remain on the air, and that the need for a local television outlet and the service it provides to otherwise underserved areas of northwestern Wyoming outweighed the need of cable subscribers (a maximum potential of 5,635 homes) in Lander, Thermopolis, and Riverton for additional and improved multiple television signals (R. 625-635; 32 FCC 459-467). The microwave application was accordingly denied "without prejudice to refiling when a showing can be made that the duplication of programming is adequately avoided and a satisfactory arrangement is arrived at by which the cable system will carry the local KWRB-TV service" (R. 631; 32 FCC 465).

On appeal therefrom the court below affirmed (Pet. App. 1-12) and thereafter denied en banc review.

Argument

For ease of treatment and in the interest of clarity, petitioner's two arguments for the issuance of a writ of certiorari (Pet. 8-20) are considered in reverse order.

1. Petitioner contends in effect (Pet. 14-20) that the Commission, in making radio microwave grants to a common carrier, is powerless to consider the impact thereof on its nationwide television allocation table (Rule 3.606) adopted in implementation of the basic policies embodied

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[1] See fn. 1, p. 7, *supra*.

in 47 U.S.C. Secs. 151 and 307(b). In that table the Commission found that ten assignments were needed to constitute a "fair, efficient, and equitable" distribution of television service to the State of Wyoming (Rule 3.606). With only three of those assignments thus far activated, Wyoming does not even now have it aliquot share of live television service (see 32 FCC 472, Fdg. 9). Notwithstanding the Commission's finding, concurred in by the court below, that the common carrier microwave grant here sought would reduce from three to two the number of operating stations in Wyoming (32 FCC 464, para. 16), leaving the northern and western half of the state without a television broadcast station of its own, such fact is irrelevant, so the petitioner would have us believe, when the Commission is making radio grants in the common carrier field.

Although recognizing (Pet. 14-15) that Congress in 1934 combined in a single agency the responsibility of regulating all interstate communications by wire and radio, common carrier as well as broadcasting, petitioner nevertheless argues that the Commission must not let its left hand knoweth what its right hand doeth. In the absence of explicit legislation to that effect, no such intention is to be ascribed to Congress. As this Court has noted in an analogous situation, involving rail and motor transportation, "principles previously established for application within a single form of transportation cannot always be transplanted to control its relations with another or those of both with the public generally, without consequences unduly harmful to one or to the public interest". *Eastern Central Ass'n* v. *United States*, 321 U.S. 194, 207.

Here, when it placed in one agency all radio communications, both common carrier and broadcasting, Congress prescribed a single test for all radio grants, whether for common carrier or broadcasting use, namely, "if public convenience, interest or necessity will be served thereby"

(47 U.S.C. Sec. 307(a)). That same test was explicitly repeated by the Commission in its rules governing radio grants to common carriers for point-to-point microwave use (Rule 21.700).

"[W]hat is in the public interest is, as the Supreme Court has said many times, within wide limits for the Commission to determine." *Harbenito Broadcasting Co. v. Federal Communications Commission*, 94 U.S. App. D.C. 329, 334, 218 F. 2d 28 (1954). The Commission is free to consider not only the mandates and policies which Congress has laid down in the Communications Act but congressionally declared policies embodied in other legislation (monopoly, diversification, etc.). *Mansfield Journal Co. v. Federal Communications Commission*, 86 U.S. App. D.C. 102, 106-107, 180 F. 2d 28 (1950).

As succinctly stated in *Carroll Broadcasting Co. v. Federal Communications Commission*, 103 U.S. App. D.C. 346, 349, 258 F. 2d 440 (1958):

> The basic charter of the Commission is, of course, to act in the public interest. It grants or denies licenses as the public interest, convenience and necessity dictate. *Whatever factual elements make up that criterion in any given problem*—and the problem may differ factually from case to case—*must be considered*. Such is not only the *power* but the *duty* of the Commission.
>
> So in the present case the Commission had the power to determine whether the economic effect of a second [radio] license in this area would be to damage or destroy service *to an extent* inconsistent with the *public interest* . . . .

That the Federal Communications Commission, functioning under a statute as broad as the Federal Communications Act, may consider the impact (i.e., the end-use consequences) of a radio microwave grant on broadcasting operations in sparsely populated northwestern Wyom-

ing follows *a fortiori* from this Court's decision construing the much narrower provisions of the Federal Power Act. *Federal Power Commission* v. *Transcontinental Gas Corp.*, 365 U.S. 1.

The breadth which petitioner would ascribe (Pet. 17) to the result reached by the Commission and by the court below in the instant case is misplaced. The instant decision turned on a special factual situation shown by the evidence of record to exist in northwestern Wyoming. Attempts by stations in other areas to make a like showing have been unsuccessful to date.

2/ Petitioner's First Amendment contentions (Pet. 8-13) are foreclosed by this Court's decision in *National Broadcasting Co.* v. *United States*, 319 U.S. 190, 226-227. It follows *a fortiori* from that decision that the denial by the Commission of an application by a common carrier for microwave frequencies because of the economic impact which such a grant would have on its television broadcast allocation table, resulting in an over-all loss of service to the public, is not a denial of free speech. See *Carroll Broadcasting Co.* v. *Federal Communications Commission*, 103 U.S. App. D.C. 346, 258 F. 2d 440 (1958).

Conclusion

The decision below is correct, no important issue calling for further review by this Court is presented, and there is no conflict of decisions. The petition for a writ of certiorari should be denied.

Respectfully submitted,

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